Petition

Supreme Court, U.S.
FILED
MAR 23 1982
ALEXANDER L. STEVAS
CLERK

81-1762

NO.

* * * * * * * * * * * * *

WAYNE WOODS,

Petitioner

v.

THE STATE OF ALABAMA,

Respondent

* * * * * * * * * * * * *

PETITION FOR A WRIT OF CERTIORARI TO THE

COURT OF CRIMINAL APPEALS OF ALABAMA

* * * * * * * * * * * * *

ARTHUR J. HANES, JR.
933 Frank Nelson Building
Birmingham, Alabama 35203
(205) 324-9536

J. LOUIS WILKINSON
617 Frank Nelson Building
Birmingham, Alabama 35203
(205) 252-4908

ATTORNEYS FOR PETITIONER

QUESTION PRESENTED

Whether the petitioner was denied his most basic right to a fundamentally fair trial as guaranteed by the Sixth Amendment and Due Process Clause of the Fourteenth Amendment to the United States Constitution where the State was allowed to hide the identity of an informer whose testimony was not only potentially helpful but also absolutely essential to the defense of the accused.

TABLE OF CONTENTS

QUESTIONS PRESENTED 1

OPINION BELOW 2

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 3

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 5

CONCLUSION 7

CERTIFICATE OF SERVICE 8

APPENDIX A A-1

APPENDIX B A-11

TABLE OF AUTHORITIES

CASES:

Roviaro v. United States, 353 U. S. 53, 77 S. Ct. 623, 1 Led. 2d 639 (1957)

Portomene v. United States, (CA 5th Fla.) 221 F. 2d 582

United States v. Conforti, (CA7th Ill) 200 F. 2d. 365

Sorrentino v. United States, (CA 9th Cal.) 163 F. 2d. 627

Davenport v. State , 50 Ala. App. 321, 278 So. 2d 769 (1973)

Davis v. State,, 51 Ala. App. 532, 287 So. 2d. 243 (1973)

Hatton v. State, 359 So. 2d. 822 (Ala. Cr. App. 1977)

McElroy v. State, 360 So. 2d. 1060 (Ala. Cr. App. 1979)

State v. Burnett, 42 N.J. 377, 201 A. 2d. 39.

PETITION FOR A WRIT OF CERTIORARI
TO THE ALABAMA COURT OF CRIMINAL APPEALS

* * * * * *

Petitioner, Wayne Woods, prays that a Writ of Certiorari be issued to review the judgment of the Alabama Court of Criminal Appeals entered on October 6, 1981, affirming his conviction under the provisions of Title 20 Section 2-20 et seq, otherwise known as the Alabama Uniform Controlled Substances Act. As charged in his indictment, and that upon such hearing being granted, the judgment of conviction be reversed.

OPINION BELOW

The opinion of the Alabama Court of Criminal Appeals (app. A., infra,. p. 1a) has been reported and is included herewith. Certiorari was denied by the Alabama Supreme Court without opinion.

JURISDICTION

The judgment of the Alabama Court of Criminal Appeals was entered on October 6, 1981, and following a refusal of certiorari by the Alabama Supreme Court, a stay of mandate pending possible review by this court was granted until March 23, 1982.

This Court has jurisdiction under U.S.C. Section 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth and Fourteenth Amendments to the United States Constitution and Title 20, Section 2-20, et seq., Code of Alabama 1975.

STATEMENT OF THE CASE

The petitioner along with one Doyce Alon Ballenger was allegedly involved in the sale of a large quantity of a substance alleged to be illegal under Alabama law (viz., methaqualone). The State of Alabama contended that the case arose out of an undercover activity conducted by a jointly funded United Narcotics Detail Operation in which he was accused of actually transferring the illegal pills in a suitcase to a pair of undercover operatives in the presence of an alleged"confidential informer" at a restaurant in Sumiton, Alabama. It was contended that simultaneously a confederate of the defendant was receiving payment for the pills at a motel in Birmingham, Alabama, (some thirty miles distant).

Ballenger was arrested immediately upon receipt of the money. The accused was arrested some days after

he supposedly transferred the pills to the officers.

At the trial, petitioner denied ever going to the restaurant and transferring the pills. The State's evidence was the "identification" of him by the two undercover agents alone.

Petitioner's contention on appeal was based upon the fact that at the trial the name of the "confidential informer" was denied to him, it being undisputed that this person was present and knew the guilty party's identification.

In fact, the trial and appellate courts actually based their rulings on the fact that the informer probably didn't see the actual transfer of the pills in question. Of course, the whole issue was not whether they were transferred but who transferred them and it was undisputed that the person who came into the restauran and left with the officer absolutely transferred the pills. Unfortunately, inly the informer positively knew the identity of that person beforehand. His testimony would have certainly cleared the accused or his identity was known to the petitioner, if he was guilty, and thus still not privileged.

REASONS FOR GRANTING THE WRIT

The reasons for granting the writ are believed by the petitioner to be all too plain and of basic constitutional stature. If this case is allowed to stand, the State of Alabama will be exempted from the requirement of giving certain accused persons fundamentally fair trials.

This Court has always held that the privilege of withholding an informer's identity has always been limited where the disclosure of same is relevant and helpful to the defense of an accused or is essential to the fair determination of a cause. In these situations, the trial court must require the state to disclose or dismiss as it sees fit.

Whenever the question of the prosecution's right to withhold the identity of an informer who helped set up the commission of the crime and was present at its occurrence has been presented, the answer in all Federal Courts has always been to require disclosure when the informer's testimony may be relevant and helpful to the accused's defense.

See Roviaro v. United States, 353 U.S. 53, 77 S. Ct. 623, 1 Led 2d. 639 (1957), Portomene v. United States (CA 5th Ala), 221 F. 2d. 582, United States v. Conforti,

(CA 7th, Ill.) 200 F. 2d. 365 and Sorrontino vs. United States, (CA 9th Cal.) 163 F. 2d 627.

In fact, up until the instant case the Alabama Appellate Court had held consistently with the federal authorities cited. See Davenport v. State, 50 Ala. App. 321, 278 So. 2d. 769 (1973); Davis v. State, 51 Ala. App. 532, 287 So. 2d. 243 (1973); Hatton v. State , 359 So. 2d. 822, (Ala. Cr. App. 1977); McElroy v. State, 360 So. 2d. 1060 (Ala. Cr. App. 1979).

What happened in the case at bar is really clear. The State of Alabama Courts abandoned all existing precedent and gave the State prosecutors an almost unqualified right to withhold the identity of a material witness from the defendant to his positive detriment on some dubious claim of "privilege".

Our constitution demands redress. The petitioner pleads for it. This court is his last repository of hope.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

/s/ Arthur J. Hanes, Jr.
ARTHUR J. HANES, JR.
933 Frank Nelson Building
Birmingham, Alabama 35203
(205) 324-9536

/s/ J. Louis Wilkinson
J. LOUIS WILKINSON
617 Frank Nelson Building
Birmingham, Alabama 35203
(205) 252-4908

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petition for Writ of Certiorari has been mailed, postage prepaid, this the 22nd day of March, 1982, to:

Honorable Charles A. Graddick
Attorney General - State of Alabama
250 Administrative Building
Montgomery, Alabama 36130

/s/ Arthur J. Hanes, Jr.
ARTHUR J. HANES, JR.
933 Frank Nelson Building
Birmingham, Alabama 35203
(205) 324-9536

/s/ J. Louis Wilkinson
J. LOUIS WILKINSON
617 Frank Nelson Building
Birmingham, Alabama 35203
(205) 252-4908

Appendix

October 6, 1981

APPENDIX A

THE STATE OF ALABAMA --- JUDICIAL DEPARTMENT

THE ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM 1981-82

6 Div. 575

Wayne Woods

v.

State

Appeal from Walker Circuit Court

HARRIS, PRESIDING JUDGE

The appellant was indicted by a Walker County Grand Jury for unlawfully selling tablets containing methaqualone, a controlled substance. A Walker County Circuit Court jury convicted the appellant of violating Alabama's Uniform Controlled Substances Act of 1971. The jury assessed a $25,000.00 fine against appellant and the trial court sentenced him to fifteen (15) years imprisonment.

This case arose out of an undercover operation conducted by United Narcotics Detail Operation, commonly known as UNDO, a combined undercover police investigation

unit investigating drug violations. The unit in carrying out its investigative duties often relies on the help of anonymous informers. One such informer was utilized in the case at bar, and such use is the sole basis of appellant's appeal.

The record shows that, on July 14, 1979, undercover agents Robert Lamm, Charles Jordan, George Howze and Norman Harris drove to Godfrey's Restaurant in Sumiton, Alabama, a small community located in Walker County. The officers were not in uniform but were dressed in street clothes, posing as men interested in buying drugs as part of the undercover operation.

Officers Lamm and Jordan entered the restaurant while Howze and Carson remained outside providing cover in case of an altercation. Lamm testified that, soon after he and Officer Jordan sat down, the defendant entered the restaurant, approached their table, and introduced himself as "Wayne".

The man identifying himself as "Wayne" stated that he was "ready to do the deal." Lamm and the person identifying himself as "Wayne" proceeded to a pay telephone in the restaurant, while the informer remained at the table, to call "Wayne's" accomplice and some other under-

cover agents who were with the accomplice at the Passport Inn in Birmingham. "Wayne" was to call when the drug deal was completed in order for "Wayne's" accomplice to receive payment for the drugs from the undercover officers in Birmingham.

Officer Jordan testified that, after the first phone call, Lamm, "Wayne", and he walked outside to the restaurant parking lot where the actual drug transfer occurred. The record shows that the man identified as "Wayne" went to a 1978 Blazer vehicle, opened the rear of the Blazer and removed two pieces of luggage. He then opened the larger of the two pieces in which Officer Lamm observed a large quantity of white pills in plastic bags. Lamm then inspected the pills. The two men closed the luggage and carried it to the officers' pickup truck. Importantly, the informer, who remained in the restaurant, did not witness the actual drug transaction in the parking lot.

After the drug transfer, the three men re-entered the restaurant. The man identifying himself as "Wayne" told Lamm that he did not have the agreed upon 50,000 pills, but only 40,000. Lamm and "Wayne", out of the presence of the informer and Jordan, sat back down and

refigured the price for the drugs. The two men walked back to the pay phone and again called the accomplice and the undercover agents with him in Birmingham to relay the change in price. Lamm and Jordan shook hands with "Wayne" and left. They then carried the pills to the Jefferson County Sheriff's Office where a qualified criminologist with the Department of Toxicology discovered that the pills contained methaqualone, a controlled substance. The accomplice in Birmingham was immediately arrested and defendant Wayne Woods turned himself in a few weeks later.

During the course of the trial, the appellant attempted to elicit the identity of the informer, once by motion and once in the form of questioning which was objected to and the objection sustained. The appellant contends that the trial court committed reversible error in not forcing disclosure of the informant's identity.

Both appellant and appellee cite the U. S. Supreme Court case Roviaro v. U. S., 353 U.S. 53, 77 S. Ct. 623, (1957). The Roviari court, in establishing a guide used to determine whether a government informer is privileged from testifying, held that the courts are to balance the

public interest of protecting valuable sources of criminal information with the defendant's right to a fair trial. The determination is to be made on a case-by-case basis depending on the particular facts and circumstances in each case.

The facts are not the same in the case at bar. The most significant difference between the two cases is the fact that the informer in the present case was not present at the drug transfer and thus did not witness the actual occurrence of the alleged crime. The State presented evidence that showed that the informer did not participate in the initial conversation between the officers and the man identified as "Wayne", did not witness the actual crime being committed (the transfer of drugs in the parking lot of the restaurant), and was not present during the two phone calls by Woods and Lamm to the accomplice in Birmingham.

A case cited by appellee, Kilgore v. State, 280 So. 2d 206, 50 Ala. App. 501 (1973), is almost on point. In that case, an undercover agent accompanied by a female known only as "Betty" drove to a service station operated by the defendant. The defendant approached the car, was introduced by the informer and asked the agent what

he needed. The agent asked the defendant if he had any "speed", to which the defendant replied that he had some various illegal drugs and quoted the going price of the drugs. After these price negltiations the agent gave his order. The agent, leaving the informer behind, got out of the car and walked with the defendant into the service station. The actual drug exchange then occurred, out of the informer's sight.

The court stated that the primary policy reasons in forcing disclosure arises in situations where the accused alleges that he was entrapped into committing the alleged crime. The court also stated that "fundamental requirements of fairness compels disclosure in such cases where the informer plays a major and active part in bringing about the sale of narcotics and continues an active participant therein." Kilgore v. State, supra.

The court in Kilgore found that, because the defendant denied the drug transfer ever took place, the defense of entrapment was not available since the defense required that the defendant acknowledge the occurrence. Because the defendant did not properly raise a defense of entrapment, the major policy reason behind disclosure was absent. Therefore the court refused to

force disclosure of the informant.

Appellant in the presnet case also did not affirmatively raise the defense of entrapment. Again, since the defense of entrapment was not raised, the primary policy reason in forcing disclosure was absent.

Also, as in Kilgore, the informer was not an active participant. The facts as to the informant in the present case are almost identical to the facts in Kilgore. As discussed above, and as in Kilgore, the informer in the present case did not witness any occurrence besides the initial negotiating, the most important fact considered by the court in Kilgore in denying disclosure. The informer in the present case did not even introduce the defendant to the undercover agent, unlike Kilgore.

The appellant cites Davis v. State, 287 So. 2d 243, 51 Ala. App. 532 (1973), and Turner v. State, 298 So. 2d 45, 53 Ala. App. 114 (1974), as authority for its position that the informer's identity should be disclosed. However, the two cases are distinguishable. In Turner, unlike the present case, the informer was not only present when the drugs were transferred, the informer also received part of the contraband. In Davis, a robbery case, the testifying officer was not a witness to the crime. He was informed of the robbery one month

after its commission by an informer who was also an eyewitness. Also, unlike the present case, the arresting officer would not have been able to arrest the defendant without the informer's accusations of defendant's involvment. The most recent case decided by this court on informer disclosure is Self, alias v. State, Ala. Cr. App., [Ms. January 20, 1981] ____So. 2d ___, 1981, cert, pending. The court did find reversible error in the trial court's nondisclosure of a government informer. However, as in Davis, and unlike the present case, the informer was an active participant and eyewitness to the transaction.

The appellant, citing Davis and Turner, also contends that more than a question of the informer's participation is involved. He agrues that the present case raises an issue of identity of the man who introduced himself as "Wayne" to the undercover agents in the restaurant on the day of the drug transfer. Appellant further argues that the informer was the only witness who could properly identify the man calling himself "Wayne".

The record does not support this contention. Officer Jordan testified that he had seen the defendant before the drug transfer and that he was the same person

as the man who sold the drugs. Both Lamm and Jordan emphatically testified that the defendant in the courtroom was the same man who identified himself as "Wayne" in the drug transfer. In Davis, as stated above, the testifying officer was not even present at the occurrence of the crime and the victims of the robbery did not identify the defendant until after the informer had tipped off the officer. The defendant in Kilgore testified that he was not present at the time of the alleged crime, but, even though the informer was present when the undercover agent met the defendant, this court refused to force disclosure.

The appellant emphasizes the fact that Officer Jordan followed defendant's Blazer in order to arrest the defendant, but that the defendant was not the driver of the Blazer. Appellant contends that this was a mistaken identity and cast a doublt on Jordan's identification of Woods as the man who transferred the drugs. This contention has little merit. The record established that Jordan never personally attempted to arrest the driver, but gegan following the vehicle at a distance of two hundred yards. It is not unreasonable that Jordan would not be able to recognize anyone driving the Blazer from this distance. Jordan also indicated that, seeing

the defendant's Blazer, not seeing someone he thought was the defendant, was the reason for following the vehicle in order to make an arrest.

In light of the fact that the issue of forcing informer disclosure is a case-by-case determination dependent on the facts of each case, and in light of the facts in the present case, the trial court did not commit reversible error in denying appellant's motion to force disclosure of the informer. McDaniel v. State, Ala. Cr. App., 389 So. 2d 524, cert. denied, 389 So. 2d 527 (1980).

We have carefully searched the record for errors injuriously affecting the substantial rights of appellant and have found none. The judgment of conviction is affirmed.

AFFIRMED.

All the Judges concur.

Appendix B

OFFICE OF
CLERK OF THE SUPREME COURT
STATE OF ALABAMA
MONTGOMERY

January 22, 1982

Re: 81-221
Ex Parte: Wayne Woods
PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS
(Re: Wayne Woods vs. State of Alabama)
Appellant Appellee

You are hereby notified that the following indicated action was taken in the above cause by the Supreme Court today:

_____Appeal docketed. Future correspondence should refer to the above number.
_____Court Reporter granted additional time to file reporter's transcript to and including
_____Clerk/Register granted additional time to file clerk's record/record on appeal to and including
_____Appell___granted 7 additional days to file briefs to and including
_____Appellant(s) granted 7 additional days to file briefs to and including
_____Record on Appeal filed

_____Appendix Filed

_____Submitted on Briefs

xxx Petition for Writ of Certiorari denied. No opinion. MADDOX, J. -- TORBERT, C.J. JONES, SHORES AND [illegible]TTY, JJ., CONCUR.
_____Application for rehearing overruled. No opinion written on rehearing.
_____Permission to file amicus curiae briefs granted

_____

/s/ J. O. Sentell
Clerk, Supreme Court of Alabama